In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972
No.

Winifred M. Goudie, Petitioner
vs.
Sears, Roebuck and Company,
and
Climate Conditioning Corporation, Respondents

Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

The Petitioner, Winifred M. Goudie, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on May 12, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as does the Opinion and Order of the District of Columbia Court of General Sessions.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia was entered on May 12, 1972. A timely petition for rehearing en banc was denied on June 30, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I. Does a Statute of Limitations in the District of Columbia, §12-301 in an action for breach of contract begin to run upon the breach; discovery of the breach; completion of the contract; expiration of the guarantee; or repudiation of the contract? and,

(a) Which of these governs the obligation of the contractee to mitigate damages?

(b) Does the statute impair the obligation of a contract within the meaning of Article I, Section 10 of the Constitution of the United States where the statute has the effect of foreclosing guarantee provision in the contract?

II. Does the Uniform Commercial Code, adopted in all the States and by the District of Columbia at §28:725 of the D.C.Code deny the right to have notice under the Due Process provision of the 5th Amendment to the Constitution where under a contract, a cause of action accrues when the breach occurs "regardless of the aggrieved party's lack of knowledge of the breach"?

III. Was Petitioner denied due process of law under the 5th or 14th Amendments to the Constitution where the courts denied a complete record of proceedings necessary to an appeal?

IV. Where a substantial hazard to the public safety was condoned and compounded by the effect of denial of punitive damages; and where the courts gave no consideration to the rights of the public to have the benefit of Home Improvement permit regulations, was the denial abuse of discretion?

Constitutional and Statutory Provisions Involved

1. The 5th Amendment to the Constitution of the United States.

2. The 14th Amendment to the Constitution of the United States: Section 1.

3. Article I of the Constitution of the United States: Section 10, Clause 1.

4. District of Columbia Code at:
   a. §12-301
   b. §47-2344 and 2345
   c. §28: 2-725, Uniform Commercial Code

Ordinances

5. Regulations Governing the Conduct of the Home Improvement Business in the District of Columbia: Executive order 61-363 as amended.

6. Refrigeration and Air Conditioning Licensing Regulations: Executive order 55-2029 as amended.

Rules of Procedure

7. District of Columbia Court of General Sessions Rules of Civil Procedure: 15 (b), (c) and 16 (a).

Treatises

8. 5 Corbin on Contracts (1964) §1042, page251
9. 51 Am. Jur. 2d, §217, at page 775

STATEMENT OF THE CASE

The questions presented by the Petitioner (hereinafter Goudie) arose out of consolidated appeals and cross-appeals to the District of Columbia Court of Appeals in an action for negligence and continuing breach of four Home-Improvement contracts between Goudie and the Respondents, Sears, Roebuck and Co. and Climate Conditioning Corp. (hereinafter Sears and Climate).

These contracts provided for the sale and installation of heating and air-conditioning systems in 1963 and 1964. One system served Goudie's business premises, floors 1 and 2 of the building owned by her. The second system served her apartment on floors 3 and 4.

The contracts included these guarantees:
(a) "...compressor guaranteed 1 year. Entire unit guaranteed 5 years." (Appendix 4)
(b) "...all ducts to be properly sized for heating and cooling" (Appendix 3)
(Contracts at R.1057,1068,1132, Supplemental R.17)

The units failed repeatedly and the ductwork neither conformed to contracts nor to District of Columbia Regulations. Goudie was charged $35. for D.C. permits to ensure such conformance, but permits were not obtained by Respondents until 4 years after completion.

In 1966, Goudie discontinued payments after continuing failures and repairs. Sears and Climate sued for payment (R. 722 and 805) and Goudie filed timely answers and counterclaims (R. 723 and 806).

The trial court awarded $14,120. damages against Sears, and $245. against Climate as the cost of demolition and replacement of the faulty systems, on the grounds of negligence and breach of contract. Business losses, claimed by Goudie at the outset under Rule 17 (a) G.S.C.R.(1966) were denied, but

were calculated by the trial court in the event the "...Court's view is not sustained". The Court said "Goudie had a duty to replace the equipment in order to prevent loss of profit. Because she failed to do so in a reasonable time, recovery for corporate profits cannot be allowed, except for 1964 and 1965. Goudie was on notice after that time that successful negotiation with the parties was unlikely." (Opinion and Order, June 16, 1970. Errata July 2) Damages for fraud and concealment in connection with failure to obtain permits were denied as follows: "The Court finds Goudie has failed to carry her burden on punitive damages", with no further comment. (Appendix 5)

The Court of Appeals, on May 12, 1972, in a surprising opinion, (Appendix 1, Sears, Roebuck and Co. v. Goudie, not yet reported) reversed the trial court in both directions; denying replacement costs on the ground that this "personal" loss was an amendment to the counterclaim made 8 days after the Statute of Limitations had run (page 4); and awarding "business" losses on the ground that these were the natural consequence of the breach and had been raised in the original counterclaim, timely filed. Questions of "fraud, denial of discovery and frivolous delays in litigation" were acknowledged (page 3) and dismissed (page 8) in a brief statement that "the record reveals that the trial court did not err in finding against Goudie". The question of mitigation was similarily dismissed by reliance on the findings of the trial court (page 12, Appendix 1)

Goudie's counterclaims have suffered several attacks below, but were finally reinstated and amended by a pretrial order (R.867). The amendment increased the ad damnum clause and asserted fraud which had been concealed by the Respondents until that time, and for which punitive damages

were sought (R. 824 and 843). The opinion of the Appeal Court states that the statute of limitations began to run on "the most recent date of completion of any of the contracts" (page 6) without regard to guarantee provisions of the contract, although it recognized an "implied" warranty.

Questions I, II, and IV arose with this perplexing opinion, leavened by its conflict with the controlling and recent opinion in Fowler v. A&A and O'Reark, D.C.App., 262 A2d 344 (1970) to be found at (Appendix 2) upon which the trial court and Petitioner relied. Petition for rehearing was denied on June 30, 1972 (Appendix 8)

Question III arose after the judgment of the trial court had been entered, when it was discovered that certain exhibits belonging to Goudie were missing. A motion for completion and correction of the record was filed with the trial court in accordance with the Rules (R.991) and later, a memorandum setting out the facts more fully at the request of the court (R.1003) In an order denying the motion, the court stated it was "satisfied that, except for minor errors in spelling, grammar and diction, the trial transcript is substantially an accurate record of proceedings..." (R.1007). A similar motion was then filed with the Appeal Court (June 18, 1971) and was denied on August 20, 1971.(Appendix 9) No findings accompanied this denial.

The facts which gave rise to Question III are more clearly, if not calmly, set out in those motions. It will suffice here to say that the file was removed from the custody of the Court by Respondents. The record shows considerable effort by the trial court to retrieve exhibits from various counsel during the 16 months the cases were under advisement (Supplemental R. 41 and 45) They were returned in an envelope bearing the return address of Sears' counsel.

No list of exhibits was kept by the trial court. Goudie's counsel listed 7 exhibits, of which 5 are no longer in the jacket. The appeal Index now shows DX 5 through 10, and 14 missing.

When the transcript of proceedings was certified a year later, it contained 720 pages, alleged to represent 7 full days of trial. It referred to exhibits no longer in the file (T. 6 and 7) and omitted references to those which were returned.

Petitioner submits here an excerpt from the appeal index, (Rec'd June 8, 1971) showing the first page number for each day. For the convenience of the Court, the last column shows the total pages for each day:

Trial Date:	R. page:	Total Pages:
September 25, 1968	1	116
September 26, 1968	117	125
September 30, 1968	242	230
October 15, 1968	472	8
October 25, 1968	480	104
February 3, 1969	584	76
February 4, 1968	660	60

Both courts refused to allow a count of reporter's stenographic note packets and neither made findings relating to the missing exhibits.

Petitioner raised the question of her Constitutional denial of due process in the Motion for Completion and Correction of the Record to the Appeal Court which was filed on June 18, 1971 at page 5 thereof; and in her Petition for Rehearing en banc, which was denied without comment. (Appendix 8)

At first glance, Goudie might seem to have been the "prevailing" party, to whom a review should not be granted. But the cold reality is that her award was insufficient to pay the costs of this Pyrrhic victory, and she lost $14,120. on reversal.

REASONS FOR GRANTING THE WRIT

The importance of the questions herein can most easily be measured by the lengths to which Sears has gone to defeat a just adjudication of highly questionable Home-Improvement contracts, and the fraudulent practices they breed. Sears is the biggest Home-Improvement contractor in America, and the conduct of this case attests to the deceptive means by which it has achieved that distinction.

The contracts with which this action is concerned are used throughout the United States and contribute a large share to Sears' 10 billion dollars of yearly sales. Thousands of homeowners find themselves, as this Petitioner was, duped into a contract in which, much later, the small print revokes Sears' spoken and advertised promises and written guarantees, leaving them no recourse against the dangerous negligence of an installer who is only "arranged for" by Sears, and with whom they find they have no contract. He, in turn, has no responsibility to the homeowner.(Appendix 3)

The magnitude of illegal profits to be had by such practices is confirmed by the number of Home-Improvement frauds draining the resources of our courts and, indeed, seeping into the chambers of our Congress, where the stigma of bribery in the recent Monarch case gave credence to the gossip around the District Building.

If there is a note of outrage in these pages, it is because we dare not suppress too much outrage without the risk of losing, entirely, our right to express it. That risk presented itself, after 7 years of unrelenting abuse of process, with the Respondents' final, clumsy attempt to tamper with the record.

The importance of this case to the public interest, and to the survival of the judicial process, cannot be overestimated.

A. No clear guidance exists in the law with regard to remedies for a continuing breach of contract or warranty giving rise to continuing damage.

The enlightenment, by this Court, of the hazy and limited law which controls a continuing breach, with the attending questions of limitations, mitigation and guarantees; all depending on semantic interpretations of "cause" and "claim" and "right of action" which differ between the circuits, might well serve to resolve the Pandora's box of litigation which was opened by the opinion below. (Appendix 1) Sears, Roebuck v. Goudie, May 12, 1972, not yet reported.

The Appeal Court fails to make these semantic distinctions, and uses the terms interchangeably, referring to loss as "a cause of action asserted in a counterclaim" (page 6) and to a "claim of breach of contract" (page 5, para. 3) thus reversing the sequence of "cause" and "effect". The "cause of action asserted" was defined as "personal" loss, a term never used in the pleadings.

The opinion does not consider the continuing nature of the breach, and of the losses. This concept is buried in a morass of semantic confusion. One need only consult Black's Law Dictionary to find the need for clarification by this Court of the mean- of these terms where they conflict between Circuits. This conflict results from questions of continuing breach, or continuing losses, upon which there is no authority, and the difficulty derives from the need to establish a point in time when the breach or loss begins or ends. The answer is that it doesn't.

B. The opinion below conflicts with Rules of Procedure identical to the Federal Rules.

In Sears, (supra) the denial of Respondent's amendment to the counterclaim is in conflict with

Rule 15 (c) G.S.C.R.(1966) which is identical to the Federal Rule:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth ...in the original complaint, the amendment relates back to the date of the original pleading". (in part)

At 15(b) this rule provides for liberal amendments even after judgment. The opinion erroneously applied 15(c) to "reinstatement" (page 6) when there had been a pretrial order allowing reinstatement and amendment (R.867), both of which are controlled by Rule 16(a), also identical to the Federal rule.

In the District of Columbia, these rules have the force of law, equally binding on judges and litigants. D.C. v. Hunt, 82 U.S.App.D.C.159 (1947).

C. The opinion below conflicts with its own controlling decision and with decisions of other Circuits, and of this Court, as to limitations.

Both the trial court and the Petitioner relied upon a recent controlling opinion in the D.C. jurisdiction (Appendix 2) Fowler v. A&A and O'Rourk D.C.App., 262 A2d 344 (1970) which was also a Home-Improvement case, except that it guaranteed a dry basement. There were only replacement costs involved, and no continuing business losses. In Fowler, (supra) the Appeal Court allowed replacement costs where the circumstances were identical to those in the instant case. The Fowler contract was completed in 1961 and the breach was discovered in 1962 (page 2) O'Roark, the contractor "on numerous occasions, promised to correct the defect. Only after June 10, 1963, was it apparent that O'Roark had totally repudiated the contract. Accordingly, the statute of limitations began to run against the repudiation of the promises." (page 4)

The Appeal Court then allowed a claim originally filed in 1966, five years after completion, a decision totally inconsistant with the astonishing conclusions reached in the instant case.

Mr. Justice Holmes once allowed reinstatement after seven and a half years, and said:

"When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the Statute of Limitations do not exist..." N.Y.Cent.&H.R.R.co. v. Kinney (1922)

In Nelson v. First Nat.Bank, and Baltimore and O.S.W.R. Co. v. Carroll, 280 US 491, it was held "The doctrine of the relation back of amendments to the commencement of a suit is a fiction of law, and it should never be applied when it will operate to cut off a substantial right of defense to new matter introduced by the amendment to the complaint although connected with the original cause of action."

In the instant case, no defense was jeopardized. No witness threatened to die or disappear and the only stale aspect of the claim was Respondents' deliberate and unconscionable delay. A disturbing aspect of the Sears' opinion is that it contorts the intent of the statute from one of repose, to one of attack against a legitimate and active claim where the complaint stood ready for trial and the same evidence served to sustain the averments of both parties. The Appeal Court contrived a distinction between "personal" loss and "business" loss, when the pleadings originally filed contained both. The opinion, (page 8, para.3) actually misquotes the original counterclaim (R.723) in which Goudie claimed "business interruption, financial loss, damage to property and loss of time to the defendant" caused by negligence, which was alleged in the original pleading. Both these counterclaims must be regarded as one, since Sears stipulated it would be responsible for all its actions

as principal. (Appendix 5,page 12 footnote 6)When we add distortion to semantic error, we are lost.

Where contractors can rely on these semantic distractions, our courts will continue to serve the purpose of defeat by delay, as in the instant case. This principle was also successful with regard to Goudie's obligation to mitigate damages.The lower courts ruled that obligation to "replace the equipment", at a cost of $16,000.(Appendix 3, page 19) commenced in 1966 with "notice", but did not say what that notice was, since negotiations continued until 1967(DX 15, R.1051). The prevailing opinions in 5 A.Corbin, Contracts (2d ed. 1964) § 1042 at pages 251, 268 and 272 do not support the findings below. These findings conflict with the guarantee provisions of the contracts, as did the findings on limitations, in such a way as to "impair the obligation of contracts" under Article I of the Constitution of the United States: Section 10, Clause 1.

The Appeal Court misconstrued the statute of limitations at D.C.Code §12;301, overlooking the commencement of time when "the right to maintain action accrues". It is well settled that no right of action accrues until there has been damage, and that subsequent rights accrue when there is subsequent damage from subsequent "occurences or transactions or conduct". (Appendix 1, page 6)

This brings us, full circle, back to the need for this Court to formulate a concise doctrine of continuing breach designed to refine and replace these sprawling concepts which only serve to encourage litigation.

The Uniform Commercial Code adds to the sprawl with a provision which excludes any requirment of knowledge, and instead places the breach at the time of delivery, from which the statute begins to run. D.C.Code §28:2-725 (2):

"A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."
(in part, emphasis supplied)

Petitioner has asked the Court to consider this provision because it seems to deny the right to have notice as guaranteed by the due process clause of the 14th Amendment to the Constitution. One cannot be said to have notice without knowledge.

D. The public interest requires the deterrant effect of punitive damages for violation of an ordinance designed to ensure the public safety.

The record shows that Respondents wilfully and repeatedly violated regulations intended to guarantee the benefit, to the public, of the technical expertise, inspection and approval of government inspectors; following and depending upon the issuance of the required permits.

In this jurisdiction, it is held that the court "must take judicial notice of the Municipal ordinances of the District of Columbia". Tipp v. D.C.(1939) 102 F2d 264. The applicable ordinance was entered in evidence in the instant case, and contains the following provision:(DX 3)

"Section 10.Refrigeration and Air-Conditioning Permits. (a) Permits for work to be done...shall be issued by the Director of Licenses and Inspections only to a person holding a valid license as a Master Refrigeration and Air-Conditioning Mechanic or as a Master Refrigeration and Air-Conditioning Mechanic, Limited..." (in part)

When D.C. officials testified for Sears that these permits were Goudie's responsibility, it was extablished that she held no valid license as a Master Mechanic.

Sears responsibility is as follows under the

"Regulations Governing the Conduct of Home-Improvement Business in the District of Columbia:"

"Section 18. Contractor Responsible for Required Permits. Each home improvement contractor entering into a contract for the performance of any home improvement work for which a permit is required by applicable law of the District of Columbia shall be responsible for taking such action as may be necessary to insure that such work is performed only under the authority of such required permit and in accordance with all of its terms." (Executive orders No. 55-2029 and 61-363, authorized by D.C.Code §47-2344 and 2345)

Sears and Climate had never obtained any permits for thousands of Home-Improvement jobs involving gas and electrical connections in the District of Columbia. (Appendix 4, memorandum of testimony deleted from the transcript: Supplemental DX 62) This wilful and continuing danger to the public carries criminal penalties of $300. for each day of each violation.

The trial court found that "Climate did the work without proper permits but charged for them anyway". (Appendix 5, page 22, para.1) Such a finding deserves a more serious consideration than is shown in the ruling which follows,"The court finds Goudie has failed to carry her burden on punitive damages." The Appeal Court finds "the record reveals that the trial court did not err.."(Appendix 1, page 8) but does not say where in the record these revelations are to be found. Neither court appeared to give any weight to the needs of the public, nor, in fact, to the testimony and evidence.

E. The ultimate judicial responsibility for the sound administration of justice lies in the Supreme Court.

More for this reason than any other, the Petitioner earnestly asks this Court for review. The Constitutional denial of due process by reason of Sears' and Climate's tampering with the record; and the refusal of the lower courts to act upon repeated requests for an infusion of logic and law into these events, is of the utmost importance to the survival of our system of justice. Only a petty prejudice against pro se litigants, clearly stated in the record, was brought to bear upon the ultimate resolution of this important question.

In spite of the best efforts of this Court, and of the Congress, to reform these odious practices, the "game of musical chairs" continues, with dishonest clerks quietly shuffled off to shephard jurors or supervise the musty and atrophied files of the Committee on Admissions and Grievances. Nor can these abuses be dismissed by an incredible pretense of "error" on the part of the court reporter who continues to report proceedings upon which people's lives may depend.

"The people" in the 9th Amendment to the Constitution to whom this Court is responsible include our young. Can we logically advise them to work for justice and reform "within the system" which has produced such a case history as this?

"The people" are taxpayers who pay for their own defeat in our courts. They also pay the price of putting a man in jail because he stole a $6. pair of shoes from Sears, whose "white collar" crime goes unchecked because it is said to be "victimless" and "non-violent". Petitioner submits she is no less a victim than the maimed and robbed, and that more harm has come to our system of justice than could have been accomplished by violence.

This Court retains the responsibility for change "within the system" and for this reason, and those above, Petitioner prays this writ be granted.

Respectfully submitted,
Winifred M. Goudie, pro se

> application of the statute of limitations, whether it be by amendment of the declaration or bill of complaint, by addition of new and independent counts to a declaration, or by the interposition of a counter-claim by way of a plea of set-off, which may of itself be the foundation of a substantial judgment for the defendant." *Id.* at 126-27. [Morris, J., denying petition for rehearing.]

This statement is in accord with the generally accepted view that affirmative claims made by way of setoffs and counterclaims must be tested by the statute of limitations while recoupment sought only by way of defense is a right that continues in existence with the primary claim. *Sullivan v. Hoover*, 6 F.R.D. 513 (D.D.C. 1947). *See also* 20 Am. Jur. 2d *Counterclaim, Recoupment, Etc.* §§ 6, 7, 8 (1965).

In the instant case, Goudie has asserted her claim of breach of contract both as a matter of defense (recoupment) and as an affirmative cause of action on counterclaim. To the extent that Goudie's claim went beyond matters of defense, it must be tested by the statute of limitations.

The law in this jurisdiction is clear that the statute of limitations in an action for breach of contract, including breach of warranty, runs from the time of the breach or completion of the contract. *Poole v. Terminix Co. of Maryland and Washington, Inc.*, 91 U.S.App.D.C. 287, 200 F.2d 746 (1952); *Maddox v. Andy's Refrigeration & Motor Service Co.*, D.C.Mun.App., 160 A.2d 799 (1960). Sears claims that the three-year statute of limitations found in D.C. Code 1967, § 12-301, governing contracts, should apply to the instant case. However, Goudie contends that the four-year statute of limitations in D.C. Code 1967, § 28:2-725(1), regarding sales of goods, is controlling. Although Goudie's viewing these contracts as being

covered by the sale provisions of the commercial code may have merit, the statute of limitations provision therein is not to be applied to actions that accrued prior to January 1, 1965. D.C. Code 1967, § 28:2-725(2), (4). The general three-year statute of limitations provision contained in section 12-301 is therefore appropriate.

As applied to the instant case, section 12-301 would bar a cause of action asserted in counterclaim which was brought more than three years after August 15, 1964, the most recent date of completion of any of the contracts.[2] Goudie's first counterclaim was brought in July of 1966 and sought "loss of business income." Although this claim was later dismissed by the court, Goudie was successful in obtaining its reinstatement at a later date. The fact that the counterclaim for loss of business income was reinstated after the expiration of the statute of limitations does not affect the right to assert the claim because a counterclaim which is merely reinstated relates back to its original date. SUPER. CT. CIV. RULE 15(c). *See also Dawn v. Stern Equipment Co.*, D.C.Mun.App., 134 A.2d 341 (1957); *Nesbit v. Pollak*, D.C.Mun.App., 80 A.2d 54 (1951). Whether or not Goudie was reasserting the same claim (loss of business income) or whether she had been diligently pursuing her cause of action[3] were matters which in the trial court's discretion could be considered in allowing the reinstatement of the counterclaim. We find no abuse of discretion in allowing reinstatement.[4]

---

[2] The breach of contract involved in this case deals with Sears' implied warranty that it was providing adequate air-conditioning equipment for Goudie's building. Such guarantees were continuous, running through all Sears contracts which were ultimately completed prior to August 15, 1964. We have no occasion to disturb the trial court's findings regarding the existence of this warranty. *See* D.C. Code 1967, § 17-305(a).

[3] *Cf.* Slater v. Cannon, D.C.Mun.App., 93 A.2d 92 (1952).

[4] Whether ultimate relief was properly granted on the merits of the reinstated counterclaim is discussed, *infra*.

Sears' contention that the original dismissal of the counterclaim should be res judicata and thus bar reinstatement of the counterclaim is without merit. Rule 54(b) of the Superior Court Rules of Civil Procedure provides in part:

> "When more than one claim for relief is presented in an action, . . . [including counterclaims], the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, . . . the order or other form of decision is *subject to revision at any time before the entry of judgment* adjudicating all the claims and the rights and liabilities of all the parties." [Emphasis supplied.]

The dismissal of the counterclaim for loss of business income falls within the provisions of Rule 54(b) as an order "subject to revision" before the entry of judgment. Such orders are interlocutory in nature and are not final or subject to immediate appeal. *Golden Commissary Corp. v. Shipley*, D.C.Mun.App., 134 A.2d 324 (1957). Similarly, because such orders are not final, they cannot give rise to the asserted bar of res judicata in later proceedings in the case. *See* 6 MOORE'S FEDERAL PRACTICE ¶ 54.42 (2d ed. 1971). *See also Republic of China v. American Express Co.*, 190 F.2d 334, 339 (2d Cir. 1951). It is only after final judgment has been rendered that prior provisional orders become effective as final orders, giving rise to appealability or a claim of res judicata. Here, the order dismissing the original counterclaim against Sears was revised, as Rule 54 allows, at the time the Sears and Climate cases were joined.

To the extent the counterclaim also stated a cause of action which was for the first time being asserted, it cannot relate back. Because Goudie's claim for personal loss (unrelated to her loss of business income) was brought after the statute of limitations had run, it was barred. However, because Goudie also asserted her claim as a matter of defense, the trial court's findings must be considered in granting Goudie recoupment. The trial court's award of damages against Sears for Goudie's personal loss, $14,120 for replacement of the unit and remodeling and renovation, should therefore be construed as a finding for Goudie on her defense against the claim by Sears for the amount due and owing on Goudie's account.[3] Thus this award is set aside, but the findings underlying it are sustained and by operation of law are treated as defeating the amount allegedly due and owing on the account. *Durant v. Murdock, supra* at 125; *Sullivan v. Hoover, supra* at 513.

Goudie has also alleged that fraud in not obtaining proper building permits, denial of discovery, and deliberate delays in litigation should give rise to punitive damages. Because the evidence is not clear as to when these causes of action might have accrued, we will assume, without deciding, that Goudie's claim for punitive damages was timely brought under the statute of limitations. On the merits of those claims against Sears and Climate the record reveals that the trial court did not err in finding against Goudie.

Goudie's Counterclaims for Loss of Business Income

The counterclaims originally asserted by Goudie sought "her loss of business income" and "financial loss resulting from business interruption." Because the contracts in question were executed by Goudie in her name for work to be done to the building she owned, the question of her

[3] "[Recoupment] cannot . . . be used as a sword to accomplish a recovery against the plaintiff over and above plaintiff's claim where it [the counterclaim] is barred, as here, by the Statute of Limitations." Sullivan v. Hoover, 6 F.R.D. 513, 514 (D.D.C. 1947).

being a real party in interest in this litigation is easily resolved in her favor. Moreover, Sears and Climate have both selected Goudie as the appropriate party to be sued for nonpayment under the contracts. Any defense of, or counterclaim for, breach of contract affecting Goudie could be asserted by her. The real question remaining is whether the particular business loss in this case was suffered by Goudie and was the natural consequence of the contractual breaches.

The law in this jurisdiction regarding the extent of damages allowable in a breach of contract has been recently articulated and is in conformity with the law of other jurisdictions. *Fowler v. A & A Company*, D.C.App., 262 A.2d 344 (1970). In *Fowler* this court, quoting the following excerpt from *Hadley v. Baxendale*, 9 Exch. 341 (1854), in setting forth the appropriate standards to be applied in situations where possible collateral damages may have also resulted, said:

> "'When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.'" [*Fowler v. A & A Co.*, *supra* at 349.]

Such damages may also extend to loss of business income or profits suffered through collateral contracts or from collateral sources if such damages were otherwise foreseeable and proved with certainty. 22 Am. Jur. 2d *Damages* §§ 61-62 (1965).

The record herein reveals that Sears knew there was a business entity to be operated for profit as a coffeehouse

in the two lower floors of the building.[6] Sears was aware that Goudie was in fact the person who operated the coffeehouse. She also allowed complete inspection of the premises and made available to Sears the architectural plans for remodeling which showed specifically that the lower floors were to be utilized for the business operations of a coffeehouse. Climate was similarly on notice as to the reasons Goudie desired air conditioning prior to making its separate contracts with Goudie inasmuch as Climate's agents had previously worked as installation subcontractors for Sears and were familiar with the project and Goudie's purposes. Both Sears and Climate should have reasonably contemplated that a breach of contract in providing adequate air conditioning would result in loss of business income or profits in the operation of the coffeehouse.[7] This being true, liability would extend to all such consequences "whether they are actually foreseen or not . . . ." *A.P. Woodson Company v. Sakran*, D.C.Mun.App., 129 A.2d 175, 177 (1957). *See also* 11 WILLISTON ON CONTRACTS, § 1344 at 228 (3d ed. 1968). In any event, the record reveals that both Sears and Climate were aware of the intentions of Goudie to continue her previous coffeehouse operations in the new facility.

The law also requires that any damages claimed must be proved with reasonable certainty.[8] The record reveals

[6] Goudie had discussed with Sears the alternatives in providing air conditioning for the two coffeehouse floors or merely for the lower floor until business picked up.

[7] As the RESTATEMENT OF CONTRACTS, § 330 (1932) states:

> "In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. *If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it;* otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury." [Emphasis supplied.]

[8] *See* District News Co. v. Goldberg, D.C.Mun.App., 107 A.2d 375, 377 (1954); Stern v. Ace Wrecking Co., D.C.Mun.App., 38 A.2d 626, 627-28 (1944); M & R Contractors & Builders, Inc. v. Michael, 215 Md. 340, 138 A.2d 350 (1958). *See also* 5 CORBIN ON CONTRACTS, §§ 1020-22 (1964).

that Goudie provided extensive testimony regarding the loss of business suffered by Cafe during the warm months when the air conditioning proved to be inadequate to cool the coffeehouse. Her evidence included calculations as to the average dollar amounts spent by customers over the various years for which damages were claimed, an estimation based on Goudie's personal observations (and corroborated by a former waiter) relating to the number of customers who left the coffeehouse because of the heat, as well as weather statistics showing the number of "hot" days during the periods in question. These facts were utilized in calculating the overall loss of business suffered by Cafe. The result was then adjusted to reflect the amount of net profit lost which would have been paid entirely to Goudie as her income from the business. Upon this showing of loss of business income, the trial court tentatively found "Goudie's method of computing loss of business [was] sufficiently precise to prove damages." We agree.

Although Goudie's proof of the actual amount of goodwill may have lacked mathematical precision, she adequately proved that some loss of goodwill had been suffered. The trial court's tentative finding in respect to goodwill is supported on the evidence submitted as to the actual amount of goodwill lost. *See* 38 AM. JUR. 2d *Goodwill* § 24 (1968). *See also Barrett Co. v. Panther Rubber Manufacturing Co.*, 24 F.2d 329 (1st Cir. 1928); *Stott v. Johnston*, 36 Cal. 2d 864, 229 P.2d 348 (1951).

The trial court in making tentative findings relating to Goudie's loss of business income found that Climate and Sears had both breached their respective contracts with Goudie so that the loss claimed for 1964 was to be divided equally between them. The trial court found that Goudie's duty to mitigate damages after unsuccessfully negotiating for repairs or adjustment with Sears and Climate pre-

vented further loss of business income as to Climate[9] and limited the recovery as to Sears to the years 1964 and 1965. We conclude that these tentative findings of fact are supported by sufficient relevant and probative evidence and do not erroneously apportion the damages as found. Because Sears' claim of waiver is based on either Goudie's 1968 acts of remodeling or her signing of a maintenance agreement in late 1966, the merits of this claim need not be reached where the counterclaim successfully asserting damages for 1964 and 1965 was filed in July, 1966 prior to the alleged acts of waiver.

Sears also claims that Goudie's use of her own air-conditioning motor in the system waived any rights she may have had under an implied warranty. However, the assurances made by Sears' agents that Goudie's motor was compatible with the cooling system negate this claim. We have examined the record in light of other claims made by the parties and we find them without merit.

We therefore set aside the holding of the trial court allowing Goudie's counterclaim for personal loss ($14,120) asserted after the running of the statute of limitations and limit Goudie's recovery to recoupment (negating Sears' award of $933.39 against Goudie). We also reverse the trial court's finding that Goudie should not have been allowed her loss of business income and remand with directions to enter judgment for Goudie under the tentative findings of the trial court, and in conformity with this opinion ($8,272 plus interest and costs against Sears and $1,958 plus interest and costs against Climate).

So ordered.

---

[9] Although there is some ambiguity in the record and in Climate's brief as to when Goudie's duty to mitigate arose as to Climate, the trial court's tentative findings on damages relating to business loss clearly indicate that Goudie's duty to mitigate arose sometime between the summers of 1964 and 1965.

APPENDIX 2

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4800

KENNETH LEO FOWLER and FLORA D. FOWLER, APPELLANTS,

v.

A & A COMPANY and WILLIAM R. O'ROARK, APPELLEES.

No. 4801

A & A COMPANY and WILLIAM R. O'ROARK, APPELLANTS,

v.

KENNETH LEO FOWLER and FLORA D. FOWLER,
and WASHINGTON WATERPROOFING COMPANY, INC., APPELLEES.

Appeal from the District of Columbia
Court of General Sessions

(Argued October 7, 1969 Decided February 20, 1970)

Flora D. Fowler, pro se, with whom *Kenneth Leo Fowler*, pro se, w[illegible] on the brief for appellants in No. 4800, and for appellees Fowler in No. 4801.

[illegible]el M. Parent for appellees in No. 4800 and for appellan[illegible] No. 4801.

Before KELLY, KERN and NEBEKER, Associate Judges.

NEBEKER, *Associate Judge:* These cases arise from a breach of a home-improvement contract to waterproof the basement of a home located in Maryland and belonging to the Fowlers. The contract, dated February 22, 1961, contained a handwritten statement providing that the "work" was guaranteed for 5 years. Suit was filed against O'Roark

and the A & A Company[1] on February 18, 1966. O'Roark filed a third-party complaint against Washington Waterproofing Company on April 19, 1966. The latter had agreed with O'Roark by written contract dated February 24, 1961, to do the waterproofing work. That form-contract provided:

> The above work is covered by our standard (5) year guarantee against penetration of water through surfaces treated by us. . . .

The trial court ruled that the statute of limitations did not bar the Fowlers' action. It also dismissed the third-party complaint and disallowed a claim by the Fowlers for loss of use.[2]

The waterproofing entailed extensive cement work and installation of a subsurface drain and pump. It was completed on March 10, 1961. The basement wetness returned about 15 months later in June, 1962. O'Roark was notified and repeatedly promised to correct the defects. Thereafter, the Fowlers sent a letter, dated June 5, 1963, demanding performance of the contract within 5 days. It then became apparent that O'Roark would not correct the defect. These actions were subsequently brought as outlined above.

O'Roark maintains that this action is barred by the Maryland statute of limitations which, he says, began to run from the date the wetness in the basement recurred—*i.e.*, June, 1962. We disagree. Maryland has held that their statute of limitations bars only the remedy in a contract action, *Frank v. Wareheim*, 177 Md. 43, 7 A.2d 186, 191, 193 (1939), and as such is a procedural bar only. *Mandru v. Ashby*, 108 Md. 693, 71 A. 312 (1908). Since the laws of the forum always apply to matters of procedure, *Namerdy v. Generalcar*, D.C.App., 217 A.2d 109, 113 (1966), we hold that the trial court properly applied the District of Colum-

---

[1] Hereafter, reference to O'Roark includes the A & A Company.

[2] O'Roark failed to plead the defense of mitigation of damages, and we do not consider the point in these appeals. GS Civil Rule 8(c).

bia 3-year statute of limitations.[3] We also hold that the trial court did not err in ruling that the statute began to run from the date O'Roark breached the contract by failing to correct the defect on demand—*i.e.*, June 10, 1963.

The statute of limitations begins to run in the District of Columbia from the date a contract is breached. *Foley Corp. v. Dove*, D.C.Mun.App., 101 A.2d 841, 842 (1954). Breach is "an unjustified failure to perform all or any part of what is promised in a contract" entitling the injured party to damages. *Davenport Osteopathic Hospital Association v. Hospital Service, Inc.*, —— Iowa ——, 154 N.W.2d 153, 162 (1967); RESTATEMENT OF CONTRACTS § 314 (1932); SIMPSON, CONTRACTS, § 159 (2d ed. 1965); 17 AM. JUR. 2d *Contracts* § 441 (1964). But only where the breach is material—that is, receiving something "substantially less or different from that for which he bargained"[4]—is one able to elect the alternative rights and the remedies available to him. *Sitlington v. Fulton*, 281 F.2d 552, 555 (10th Cir. 1960); *Schnepf v. Thomas L. McNamara, Inc.*, 354 Mich. 393, 93 N.W.2d 230, 232 (1958); 17 AM. JUR. 2d *Contracts* § 447 (1964).

Here it is clear that in June, 1962, the contract was materially breached when wetness returned.[5] The Fowlers could have then sued to recover damages including cost of repair. However, the guarantee provision is, as most provisions are, clearly a promise to do whatever is necessary, including repair of improperly performed work, to provide the guaranteed dry basement. The Fowlers elected to pursue this right under their contract and they clearly had that option. *Sitlington v. Fulton, supra;* RESTATEMENT OF CONTRACTS §§ 314 and 327, Comment (b) (1932); 17 AM. JUR. 2d *Contracts* § 447 (1964). They contacted O'Roark

[3] D.C. Code 1967, § 12-301 (7).

[4] SIMPSON, *supra* at § 159.

[5] *See* the discussion, *infra*, where we reject O'Roark's contention that his handwritten 5-year guarantee does not warrant a dry basement.

who, on numerous occasions, promised to correct the defect. Only after June 10, 1963, was it apparent that O'Roark had totally repudiated[6] the contract. Accordingly, the statute of limitations began to run against the repudiation of the promise to maintain dryness on June 10, 1963, and the suit was timely commenced.

O'Roark also contends that the warranty provision in the contract was not a guarantee of a dry basement. The contract provides that O'Roark would furnish all labor and material to break up and replace the floors all around the basement walls, install drain tile, gravel, and a pump. It then stated, "Work guaranteed for 5 years." The trial court found that the warranty clause was ambiguous and allowed the parties to introduce evidence of the surrounding circumstances to aid in its interpretation.

In construing a contract where the laws of two jurisdictions are involved, the forum applies the law of the state which has the "more substantial interest in resolution of the issue."[7] Normally, this would be the law of the state where the contract was executed. *Young v. State Farm Mutual Automobile Insurance Co.*, D.C.App., 213 A.2d 890, 891 (1965). But in this area of contract law, both Maryland and the District of Columbia are the same.[8] They

---

[6] Upon total repudiation of the contract one no longer has the election of continuing the contract but must timely enforce his rights through available legal remedies. Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F.2d 488, 490 (10th Cir. 1930); 17 Am. Jur. 2d *Contracts* § 444 (1964); Simpson, Contracts, § 187 (1965).

[7] McCrossin v. Hicks Chevrolet, Inc., D.C.App., 248 A.2d 917, 921 (1969). *See also* Roscoe v. Roscoe, 126 U.S.App.D.C. 317, 322, 379 F.2d 94, 99 (1967); Dovell v. Arundel Supply Corp., 124 U.S.App.D.C. 89, 90, 361 F.2d 543, 544 (1966).

[8] *Compare* Schapiro v. Jefferson, 203 Md. 373, 100 A.2d 794, 797 (1953); Slice v. Carozza Properties, Inc., 215 Md. 357, 137 A.2d 687, 693 (1958); Belmont Clothes, Inc. v. Fleet, 229 Md. 462, 184 A.2d 731, 734 (1962); Cadem v. Nanna, 243 Md. 536, 221 A.2d 703, 707 (1966) *with* Harten v. Loffler, 29 App.D.C. 490, 503 (1907), *aff'd*, 212 U.S. 397 (1909); Green v. Obergfell, 73 App.D.C. 268, 311, 121 F.2d 46, 89 (1941); Minmar Builders, Inc. v. Beltway Excavators, Inc., D.C.App., 246 A.2d 784, 786 (1968).

allow the parties to present evidence of surrounding circumstances where the trial court has found the contract provision ambiguous.

The evidence presented by the Fowlers on this question was substantial. The issues of fact were resolved by the court which found that the clause warranted a dry basement. That determination not being plainly wrong, we sustain the finding. D.C. Code 1967, § 17-305. *Freas v. Gitomer*, D.C.App., 256 A.2d 573, 574 (1969). *See also* cases cited therein. In so doing, we note that the interpretation given the guarantee provision in the Fowlers' contract is inconsistent with the more explicit guarantee in the Washington Waterproofing Co., Inc. form-contract. *Cf. Edmonson v. Mosley*, D.C.App., —— A.2d —— (No. 4713, decided December 3, 1969, slip opinion at 3).

O'Roark also contends that the third-party complaint should not have been dismissed. We disagree. O'Roark subcontracted the actual performance of the work to Washington Waterproofing Co., Inc., who in turn warranted the work. Thus, when wetness recurred in June, 1962, Washington's warranty was breached and had demand been made of it to make good its implied promise to return and improve upon its previous work, it, like O'Roark, would have been obliged to do so under pain of total abrogation. But the trial court found as a fact that O'Roark "made no demand upon [Washington] to rectify any part of its work following the complaint of the [Fowlers] that the work had been improperly done and that the basement was again damp." That finding is not plainly erroneous and we cannot upset it. This failure established June, 1962, as the date on which the statute of limitations began to run as between O'Roark and Washington. Accordingly, the third-party complaint, filed April 19, 1966, was well outside the statutory three-year period.

We come finally to the Fowlers' claim that their damages were measured improperly. The measure of damages in a "conflict case" is governed by the same considerations which apply in determining the law applicable to the substance of the contract. There being no substantial interest or public policy of the District of Columbia involved, we apply the law of Maryland.

O'Roark asserts that *Correlli Roofing Co. v. National Instrument Co.*, 240 Md. 627, 214 A.2d 919 (1965), precludes recovery of damages for injury to personal property which were the result of the breach. That is not so; the underlying contract in that case disclaimed liability to personal property damage. There is no such clause in this contract before this court.

Both Maryland and the District of Columbia recognize the damages rule established in *Hadley v. Baxendale*, 9 Exch. 341 (1854).[9] It provided:

> When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

On the record before the trial court there was sufficient evidence to sustain the finding that the damage done to

---

[9] *Compare* Winslow Elevator & Machine Co. v. Hoffman, 107 Md. 621, 69 A. 394, 396 (1908); Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co v. Messenger, 181 Md. 295, 29 A.2d 653 (1943), *with* Fries, Beall & Sharp Co. v. Livingstone, 58 App.D.C. 209, 210, 12 F.2d 150, 151 (1926); Thompson v. Rector, 83 U.S.App.D.C. 371, 373, 170 F.2d 167, 169 (1948); Guthrie v. Greenfield, D.C.Mun.App., 109 A.2d 783, 789 (1954); and Haviland v. Dawson, D.C.App., 210 A.2d 551, 553 (1965).

the personalty was a direct and proximate result of the breach.

The amount recoverable where there is no evidence of fair market value of the personalty both before and after the breach can be established by the testimony of the owners of its actual value to them. *Smith v. Potomac Electric Power Co.*, 236 Md. 51, 202 A.2d 604 (1964); *Smith's Transfer & Storage Co. v. Batigne*, D.C.Mun.App., 34 A.2d 705, 709 (1943). The trial court heard this testimony and made its assessment. We find no error.

We agree with the trial court that the evidence offered by the Fowlers to prove loss of use was inadequate. Evidence to establish the rental value must be legally relevant in time to the date the damage was incurred. 31A C.J.S. *Evidence* § 182(6) (1964). Testimony relating to the basement rental value some three years after that date was therefore properly excluded. The newspaper advertisements sought to be used as evidence of damages for loss of use had no foundation connecting them with basement apartments of the same or similar nature as that of the Fowlers. Accordingly, that evidence was properly rejected. The trial court cannot award damages on speculation and properly denied recovery of this claim. *Cf. District News Co. v. Goldberg*, D.C.Mun.App., 107 A.2d 375, 377 (1954); *Stern v. Ace Wrecking Co.*, D.C.Mun.App., 38 A.2d 626, 627 (1944). The judgment against O'Roark, the assessment of damages in favor of the Fowlers, and the dismissal of the third-party complaint are, therefore,

Affirmed.

KELLY, *Associate Judge*, concurs in the result.

LE COPY

FILED
DEC 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-507

WINIFRED M. GOUDIE, *Petitioners*

v.

SEARS, ROEBUCK AND COMPANY

and

CLIMATE CONDITIONING CORPORATION, *Respondents*

BRIEF OF SEARS, ROEBUCK AND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GEORGE H. EGGERS
Attorney for Respondent,
SEARS, ROEBUCK AND CO.
8605 Cameron Street
Silver Spring, Md. 20910

PEERS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement	2
Argument to Question I	3
Argument to Question II	6
Argument to Question III	7
Argument to Question IV	8
Appendix	

TABLE OF CASES

Chase Security Corporation v. *Donaldson*, 325 U.S. 304, 89 L.Ed. 1628, 65 S.Ct. 1137, reh. denied 325 U.S. 89 L.Ed. 2006, 65 S. Ct. 1561	4
Clark v. *Gulesian*, 1970, 429 F.2d 405, cert. den. 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed. 2d 441	4, 7
Hargraves v. *Bracket Stripping Machine Co.*, 317 F. Supp. 676 (1970)	5
Harrison v. *Meyer*, 92 U.S. 111, 23 L.Ed. 606	4
Jackson v. *General Motors Corp.*, 441 SW 2d 482, cert. den. 396 U.S. 942 90 S.Ct. 376, 24 L.Ed. 2d 243	5
Ludeling v. *Chaffe*, 143 U.S. 301, 12 S.Ct. 439, 36 L.Ed. 313	3
Maddox v. *Andy's Refrigeration and Motor Service Co.*, D.C.Mun.App. 160 A. 2d 799 (1960)	6
Minick v. *Associates Investment Co.*, 71 App. D.C. 367, 110 F.2d 267	8
Poole v. *Terminix Co. of Maryland and Washington, Inc.*, 91 U.S. App. D.C. 287, 200 F.2d 746 (1952)	6
Simmons v. *City of El Paso*, C.A. Tex., 1963, 320 F.2d 541, 85 S.Ct. 577, 379 U.S. 497, 13 L.Ed. 2d 446, reh. den. 85 S.Ct. 819, 380 U.S. 926, 13 L.Ed. 2d 813	4
Sturges v. *Crowinshield*, 4 Wheat 122, 4 L.Ed. 529, 550	4
United States v. *Morena*, 245 U.S. 392, 38 S.Ct. 151, 62 L.Ed. 359	7
U.S. v. *Nebo Oil Co.*, D.C. La. 1950, 90 F. Supp. 73 affirmed 190 F. 2d 1003	4
Rule 10(1) District of Columbia Court of Appeals	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-507

WINIFRED M. GOUDIE, *Petitioners*

v.

SEARS, ROEBUCK AND COMPANY

and

CLIMATE CONDITIONING CORPORATION, *Respondents*

BRIEF OF SEARS, ROEBUCK AND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

QUESTIONS PRESENTED

The Petitioner has stated four questions for this Court's consideration in granting her petition. All four can be resolved by asking the question whether the D.C. Court of Appeals either decided a Federal question of substance not heretofore determined by the Supreme Court or whether the action of the trial court or District of Columbia Court of Appeals was such as to prejudice a constitutional right of petitioner.

STATEMENT

Petitioner, Winifred M. Goudie, hereafter referred to as "Petitioner" has set forth a statement of the case in her Brief. Respondent, Sears, will only comment upon those portions of Petitioner's statement which it thinks relevant to the purpose of this Writ.

Although Petitioner is filing this Writ pro se, Petitioner was represented at the trial of her case by able and distinguished counsel, Jacob A. Stein, of the District of Columbia Bar.

On page 6 of her Brief, Petitioner makes certain allegations about missing exhibits. On March 22, 1971, after the Trial Court's Opinion and the appeals had been noted, Petitioner filed, pursuant to *Rule 10(l)* District of Columbia Court of Appeals, a Motion for Correction and Modification of the Record and, on May 3, 1971, filed a Memorandum On Missing Exhibits And Delations From Transcript. On May 24, 1971, a hearing was held by the Trial Judge, the Honorable Tim Murphy, on these motions. Petitioner was present with her counsel, Jacob A. Stein. Counsel for Sears and Climate were present as well as the Court Reporter who reported the trial. After a full hearing, the Trial Judge denied her motion stating, as Petitioner sets forth in her Brief on Page 6, that it was "satisfied that, except for minor errors and spelling, grammar and diction, the trial transcript is substantially an accurate record of the proceedings . . ."

Thereafter Petitioner filed her Motion to Require Transmittal of Original Papers and Exhibits And of Appellee's Additional Designation of Record (Appendix 1a, 2a, 3a). On December 9, 1971, the D.C. Court

of Appeals granted this motion (Appendix 4a, 5a) which transmitted to the Court of Appeals the Record as designated by Petitioner. Yet despite this Petitioner continues to allege certain exhibits are missing. Petitioner has never specified what these exhibits are, nor did she in her Brief to the D.C. Court of Appeals raise any issue that the Record, as finally transmitted to the D.C. Court of Appeals, and which Record was relied upon by all parties, was inaccurate in any way.

ARGUMENT TO QUESTION I

The Petitioner presents the following question:

> "Does a Statute of Limitations in the District of Columbia, § 12-301 in an action for breach of contract begin to run upon the breach: discovery of the breach; completion of the contract; expiration of the guarantee; or repudiation of the contract? and
>
> (1) which of these governs the obligation of the contractee to mitigate damages?
>
> (b) Does the statute impair the obligation of a contract within the meaning of Article I, Section 10 of the Constitution of the United States where the statute has the effect of foreclosing guarantee provisions in the contract?"

The decision of the District of Columbia Court of Appeals on the issue of the Statute of Limitations is not subject to review because it rests upon adequate and independent State or non-Federal grounds.

The construction of the Statute of Limitations of a State (or the District of Columbia) or the manner of reviewing a State decision on the subject, are matters of State or District of Columbia law and practice not depending upon the Constitution of the United States or upon any Act of Congress. *Ludeling* v. *Chaffe,* 143

U.S. 301, 12 S.Ct. 439, 36 L.Ed. 313. In *Harrison* v. *Meyer,* 92 U.S. 111, 23 L.Ed. 606, this Court held the construction in effect given by the Supreme Court of a State to the Statute of Limitations enacted by the State Legislature is not subject to re-examination by the Supreme Court under a writ of error to the State Court. Further, the Supreme Court of the United States has adopted as a working hypothesis as a matter of Constitutional law, the view that Statutes of Limitations go to matters of remedy and not to destruction of fundamental rights. *Chase Security Corporation* v. *Donaldson,* 325 U.S. 304, 89 L.Ed. 1628, 65 S.Ct. 1137, rehearing denied 325 U.S. 89 L.Ed. 2006, 65 S.Ct. 1561; *Simmons* v. *City of El Paso,* C.A. Tex. 1963, 320 F.2d 541, 85 S.Ct. 577, 379 U.S. 497, 13 L.Ed. 2d 446, reh. den. 85 S.Ct. 819, 380 U.S. 926, 13 L.Ed. 2d 813; *U.S.* v. *Nebo Oil Co.,* D.C. La., 1950, 90 F. Supp. 73, affirmed 190 F.2d. 1003. Chief Justice Marshal pointed out the distinction between the obligation and the remedy in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L.Ed. 529, 550:

> "the distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation (or state) shall direct."

In *Clark* v. *Gulesian,* 1970, 429 F.2d 405, Cert. denied. 91 S.Ct. 461, 400 U.S. 993, 27 L.Ed. 2d 441. The Supreme Court had a Statute of Limitations issue analagous to the one presented here. *Clark* was a medical malpractice action. The United States District Court for the District of Maine dismissed the Complaint and the plaintiff appealed. The United States

Court of Appeals, First Circuit, held that the application of the Maine Statute of Limitations so as to bar a malpractice action involving a towel left in abdomen by computing limitations from date of operation rather than from date of discovery of towel did not deprive plaintiff of equal protection and due process.

Chief Judge Aldrich stated at page 406:

> "The rights are not one-sided. Unfortunately as the present result may be for the plaintiff, the State may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault claimants delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment."

Hargraves v. *Bracket Stripping Machine Co.* 317 F. Supp. 676 (1970), was a negligence action for injuries sustained in 1968 by plaintiff in using a machine manufactured in 1928 by one of defendant's predecessors. The District Court, Frank W. Wilson, Chief Judge, held that the former Tennessee one year Statute of Limitations, when construed as commencing to run from date of sale of defective product rather than from date of injuries resulting from defect was not unconstitutional as denial of due process and barred the action. This construction was in accord with the construction placed upon that Statute by the Tennessee Supreme Court in the case of *Jackson* v. *General Motors Corp.*, 441 SW 2d 482, cert. denied 396 U.S. 942, 90 S.Ct. 376, 24 L.E. 2d 243.

In the District of Columbia, the Statute of Limitations in an action for breach of contract, including breach of warranty, runs from the time the breach or

completion of the contract. *Poole* v. *Terminix Co. of Maryland and Washington, Inc.*, 91 U.S. App. D.C. 287, 200 F.2d 746 (1952); *Maddox* v. *Andy's Refrigeration and Motor Service Co.*, D.C. Mun. App. 160 A. 2d 799 (1960). The District of Columbia Court of Appeals in the instant case found at Page 6, Petitioner's Appendix 1, that the three year Statute of the District of Columbia Code, 1967 Edition, § 12-301, controlled, and this determination is not one subject to review.

ARGUMENT TO QUESTION NO. II

Petitioner states question No. II as follows:

> "Does the Uniform Commercial Code, adopted in all the States and by the District of Columbia at 28:725 of the D.C. Code deny the right to have notice under the Due Process provision of the 5th Amendment to the Constitution where under a contract, a cause of action accrues when the breach occurs 'regardless of the aggrieved party's lack of knowledge of the breach' ?."

The Uniform Commercial Code has been in effect in the District of Columbia since January 1, 1965. It has been adopted by all other states with the exception of Louisiana. Section 2:725 has been adopted unchanged by most states. It is impossible to estimate the number of transactions which have taken place since the adoption of the Code, which would be subject to Section 2-725, but they must number in the billions. Petitioner would have the Court hold that as a matter of Constitutional right, the Statute of Limitations, does not begin to run on any transaction until the purchaser has actual notice. This is a novel statement of a Constitutional right for which Petitioner offers no authority.

The Supreme Court held in *United States* v. *Morena*, 245 U.S. 392, 62 L.Ed. 359, 38 S.Ct. 151, that a legislative body may, without violating constitutional guarantees, enact statutes which limit the time within which actions to enforce demands may be brought even where there was previously no limit of limitation. The Court stating that it was no destruction of a right or privilege to limit the time for its assertion as long as a reasonable time is given for the assertion of the right. See *Clark* v. *Gulesian, supra.*

ARGUMENT TO QUESTION NO. III

The third question presented by the Petitioner is:

> "Was Petitioner denied due process of law under the Fifth or 14th Amendments to the Constitution where the Courts denied a complete record of proceedings necessary to an appeal?"

The simple answer to this question is that there was no denial to Petitioner of a complete record of proceedings necessary to her appeal. She asserts that there was but in fact, she had a fair hearing on this issue; her counsel was present at that hearing by the Trial Court, she had a full opportunity to present her evidence, to cross-examine witnesses, etc. Thereafter, the District of Columbia Court of Appeals granted Petitioner's Motion to Transmit Original Papers and Exhibits and Appellee's (Petitioner's) Additional Designation of Record. The items specified by Petitioner in her additional designation of record were transmitted and became part of the Record on appeal. No injury has been done, therefore, to Petitioner's constitutional rights.